No. 91-8685

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether possession of a firearm by a convicted felon is a crime of violence for purposes of the 1989 version of the career offender Guideline, Sentencing Guidelines §§ 4B1.1 and 4B1.2 (Nov. 1, 1989).

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence, Pet. App. A, is reported at 943 F.2d 1268. The opinion of the court of appeals denying the petition for rehearing, Pet. App. B, is reported at 957 F.2d 813.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1991. A petition for rehearing was denied on March 20, 1992. The petition for a writ of certiorari was filed on June 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to a five-count indictment that charged him with bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (Count 1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g) (Count 2); use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (Count 3); possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d) (Count 4); and transportation of stolen property in interstate commerce, in violation of 18 U.S.C. 2312 (Count 5). He was sentenced as a career offender to concurrent terms of 365 months' imprisonment on Counts 1, 2, 4, and 5, and to a mandatory minimum consecutive term of five years' imprisonment on Count 3, to be followed by five years' supervised release. The court of appeals affirmed.

1. Petitioner, an escapee from the Mississippi Department of Corrections, robbed a bank in Jacksonville, Florida, on October 31, 1989. During the robbery, petitioner carried a police scanner and a hand grenade. He demanded money from a bank employee and threatened to throw the grenade into her lap if she failed to comply. The employee instructed a teller to give petitioner the money. While the teller was putting money into a plastic bag supplied by petitioner, petitioner displayed a sawed-off shotgun and pointed it at the first employee's face. The teller gave petitioner $9,427. Petitioner then ordered everyone in the bank to lie down, and he threw the grenade, which was later found to be inert, onto the floor. He fled in a pick-up truck that he had

stolen from his employer. Pet. App. 1269; Gov't C.A. Br. 3; Pet. C.A. Br. 3-6; Presentence Report 7, 8, 12; Sent. Tr. 19-20, 63, 69.

Petitioner drove to his apartment, where he got out of the pick-up truck and entered a van that he had stolen earlier that day. He stole the van by persuading a salesman at a car dealership that he wanted to test drive it. During the test drive, petitioner pulled a gun on the salesman. Petitioner drove the van to his apartment, where he restrained the salesman with handcuffs and rope and confined him in a closet. Petitioner warned the salesman that the apartment was rigged with a bomb set to explode if the closet was opened. Gov't C.A. Br. 3; Pet. C.A. Br. 5.

Petitioner drove the van to Mississippi, where he was arrested on November 3, 1989. He was found in possession of the sawed-off shotgun, a police scanner, three inert hand grenades, ammunition, bomb components, and knives. When police located the pick-up truck, they found that it contained a pipe bomb as well as the sawed-off section of the barrel of the shotgun that petitioner had used during the robbery. Pet. App. 1269; Sent. Tr. 50-55; Gov't C.A. Br. 3-4; Pet. C.A. Br. 4-5.

2. The district court sentenced petitioner in July 1990. The court found that petitioner was a career offender under Sentencing Guidelines § 4B1.1 (Nov. 1, 1989). That Guideline provides that a defendant is a career offender if "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant

has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Petitioner was over 18 and had three prior convictions for crimes of violence. The court used petitioner's instant conviction for being a felon in possession of a firearm as the predicate "crime of violence" required by the second prong of the career offender definition.[1] In so doing, the court rejected petitioner's contention that that offense did not constitute a crime of violence for career offender purposes. The court reasoned that "possession of a firearm by a convicted felon is a crime of violence both by its nature and how the weapon was used in this case." Pet. App. 1269-1270; Sent. Tr. 26-32, 40.

Petitioner's adjusted offense level was 35 and his criminal history category was VI, yielding a sentencing range of 292-365 months. Sent. Tr. 47, 80. The court sentenced petitioner at the top of the range "due to the continuing and persistent danger that [he] continues to present to the public and a history of assaultive

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[1] Sentencing Guidelines § 4B1.2 (Nov. 1, 1989) provides in pertinent part:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that --
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

and violent behavior, as evidenced by the offender's past criminal record." Judgment and Commitment Order 5.

3. a. On October 4, 1991, the court of appeals affirmed petitioner's conviction and sentence. Pet. App. A. As an initial matter, the court held that the November 1, 1989, version of the Sentencing Guidelines applied to petitioner. The court noted that petitioner was sentenced after that date and that 18 U.S.C. 3553(a)(5) directs sentencing courts to apply the Guidelines and policy statements that are in effect on the date of sentencing. Pet. App. 1270 n.2. Next, the court held that possession of a firearm by a convicted felon is "inherently" a crime of violence under Sentencing Guidelines § 4B1.2(1)(ii) (Nov. 1, 1989). Pet. App. 1269. That Guideline defined "crime of violence" in part as a crime that "involves conduct that presents a serious potential risk of injury to another." The court also relied on Application Note 2 to the 1989 version of Sentencing Guidelines § 4B1.2, which explained that the term "crime of violence" includes offenses in which "the conduct set forth in the count of which the defendant was convicted * * * by its nature, presented a serious potential risk of physical injury to another." Pet. App. 1270-1273.[2]

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[2] The court rejected petitioner's contention that the application of Guidelines § 4B1.2, as amended after the date of his offense but before sentencing, violated the Ex Post Facto Clause. The court reasoned that petitioner's sentence "was not enhanced as a result of our application of the newer guidelines and application notes," because possession of a firearm by a convicted felon also constituted a crime of violence under the earlier (November 1, 1988) version of the Sentencing Guidelines. Pet. App. 1273.

b. As of November 1, 1991, the Sentencing Commission amended the commentary to Sentencing Guidelines § 4B1.2 to state that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." Sentencing Guidelines § 4B1.2, Application Note 2 (Nov. 1, 1991). Petitioner thereupon sought rehearing in the court of appeals, contending that the amended commentary should apply retroactively to his sentence.

The court of appeals denied rehearing. Pet. App. B. The court adhered to its original interpretation of Sentencing Guidelines § 4B1.2, i.e., "that possession of a firearm by a felon inherently constitutes a 'crime of violence.'" Pet. App. 815. The court observed that, before the amendment to the commentary, at least four other circuits had held that a felon's possession of a firearm either was inherently a crime of violence or could qualify as a crime of violence in some circumstances. Pet. App. 814. The court expressed "doubt [that] the Commission's amendment to Section 4B1.2's commentary can nullify the precedent of the circuit courts." Pet. App. 815. The 1991 commentary to Section 4B1.2 had "limited authority," in the court's view, because it had not "been called to Congress' attention, much less, been authorized by Congress." Pet. App. 815. Accordingly, the court "decline[d] to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a 'crime of violence'" or until the Commission does so and submits the altered text for congressional review. Pet. App. 815 & n.4.

ARGUMENT

Petitioner renews his contention that possession of a firearm by a convicted felon was not a "crime of violence" under the 1989 version of the career offender Guideline, Sentencing Guidelines §§ 4B1.1 and 4B1.2 (Nov. 1, 1989). Pet. 11-22. He relies principally on the amendment to the commentary accompanying Sentencing Guidelines § 4B1.2 that became effective after his sentencing and after the affirmance of his conviction and sentence by the court of appeals. The commentary to Section 4B1.2 now states that a "crime of violence" does not include "the offense of unlawful possession of a firearm by a felon." Sentencing Guidelines § 4B1.2, Application Note 2 (Nov. 1, 1991).[3]

At the time petitioner was sentenced, the commentary to Section 4B1.2 did not contain the language on which petitioner relies. As petitioner concedes, moreover, the courts of appeals that considered the question before the commentary was amended concluded that a felon-in-possession offense could be a "crime of violence" for career offender purposes. Pet. 13-14. Those courts either permitted sentencing courts to look beyond the elements of the offense of conviction in determining whether a felon-in-possession offense was a crime of violence or treated such an offense, standing alone, as a crime of violence. See, e.g., United

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[3] Petitioner concedes that he is eligible for sentencing as a career offender, but argues that only his instant conviction for armed bank robbery qualified as the predicate crime of violence. Pet. 11 n.2. As petitioner notes, ibid., the use of his robbery conviction as the predicate crime of violence would have resulted in an adjusted offense level of 32 instead of 35, and a sentencing range of 210-262 months instead of 292-365 months.

States v. Cornelius, 931 F.2d 490, 493 (8th Cir. 1991) (considering underlying conduct in determining whether felon-in-possession offense is a crime of violence); United States v. Walker, 930 F.2d 789, 793-794 (10th Cir. 1991) (same); United States v. Alvarez, 914 F.2d 915, 918 (7th Cir. 1990) (same), cert. denied, 111 S. Ct. 2057 (1991); United States v. Goodman, 914 F.2d 696, 699 (5th Cir. 1990) (same); United States v. Williams, 892 F.2d 296, 303-304 (3d Cir. 1989) (same), cert. denied, 496 U.S. 939 (1990); United States v. O'Neal, 910 F.2d 663, 667 (9th Cir. 1990), amended, 937 F.2d 1369, 1375 (1991) (felon-in-possession offense is "by its nature" a crime of violence). Section 4B1.2(1)(ii) specifies certain offenses -- burglary of a dwelling, arson, extortion, and offenses involving explosives -- as "crimes of violence," but it then adds a catch-all provision reaching any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Moreover, the background of the commentary to Guidelines § 1B1.3 states that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Thus, at least where the underlying conduct presented a serious risk of physical harm, the courts of appeals properly treated felon-in-possession offenses as crimes of violence prior to the 1991 amendment.

Under the version of the Sentencing Guidelines in effect when petitioner was sentenced in July 1990, his felon-in-possession offense was a crime of violence because it "involved" the serious

potential risk of physical injury to another. The district court found that that offense was a crime of violence not only "by its nature" but also based on "how the weapon was used in this case." Sent. Tr. 40. Petitioner concedes that while robbing the bank he stuck a sawed-off shotgun in a bank employee's face. Pet. 5-6. Under these circumstances, the court was entirely justified in treating petitioner's offense as a crime of violence under the 1989 version of Sentencing Guidelines § 4B1.2. To be sure, petitioner's offense would not have been a "crime of violence" under the commentary to Sentencing Guidelines § 4B1.2 that became effective on November 1, 1991, after petitioner was sentenced and his sentence was affirmed on appeal. That commentary specifically excludes unlawful possession of a weapon by a felon from the category of "crimes of violence." Sentencing Guidelines § 4B1.2, Application Note 2 (Nov. 1, 1991). Petitioner argues that the 1991 commentary is relevant to his case because it indicates how the Sentencing Commission intended the pre-1991 version of Sentencing Guidelines § 4B1.2 to be interpreted. That assertion is incorrect and in any event does not merit further review.[4]

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[4] In a footnote, Pet. 12 n.3, petitioner asserts, without elaboration, that his sentencing under the November 1, 1989, Guidelines also raises a "concern" under the Ex Post Facto Clause, Art. I, § 9, Cl. 3. Although petitioner states that that concern "will be addressed" later in the petition, Pet. 12 n.3, he does not discuss it apart from making a passing reference in a subsequent footnote, see Pet. 17 n.8, to his having argued below "that application of the post October 31, 1989 amendments to the etent they allowed for examination of actual offense conduct, would violate the Ex Post Facto [Clause]." In any event, there is no force to his ex post facto argument; the law in effect at the time of his sentencing was the same in all pertinent respects as the law in effect at the time of his offense. Compare Sentencing

In light of the pre-1991 case law holding that a sentencing court could look beyond the face of an indictment to determine whether a defendant had committed a crime of violence, the November 1, 1991, amendment to the commentary to Section 4B1.2 is properly viewed as effecting a substantive change in the Guidelines, rather than as merely making explicit a principle that the Guidelines had previously embraced. Although the Sentencing Commission referred to the pertinent changes as "clarif[ying]" the meaning of Section 4B1.2, Guidelines App. C.254, amendment 433; see also 57 Fed. Reg. 20148, 20157 (May 11, 1992), the Commission's characterization of a change in the commentary does not require a court to give retroactive effect to the change if the change is made after the defendant's sentencing. See, e.g., United States v. Mondaine, 956 F.2d 939, 942 (10th Cir. 1992); United States v. Guerrero, 863 F.2d 245, 250 (2d Cir. 1988).

In any event, because the question presented in this case is relevant only to cases in which sentence was imposed under Sentencing Guidelines § 4B1.2 before November 1, 1991, that question is of diminishing importance. It is true, as petitioner points out, Pet. 16-17, that in the wake of the 1991 amendment some courts have held that the felon-in-possession offense can constitute a crime of violence in pre-amendment cases only if aggravating circumstances are alleged in the count charging that offense, see United States v. Johnson, 953 F.2d 110, 112-115 (4th Cir. 1992);

Guidelines § 4B1.2 & Application Note 1 (Jan. 15, 1988) with Sentencing Guidelines § 4B1.2 Nov. 1, 1989).

United States v. Samuels, No. 91-5429 (4th Cir. June 22, 1992), slip op. 4-5; United States v. Fitzhugh, 954 F.2d 253 (5th Cir. 1992); United States v. Sahakian, 965 F.2d 740 (9th Cir. 1992). Other courts have applied the 1991 amendment to sentences imposed before its effective date. See United States v. Bell, No. 91-1965 (1st Cir. June 10, 1992), slip op. 11; United States v. Shano, 955 F.2d 291, 295 (5th Cir. 1992) (withdrawing United States v. Shano, 947 F.2d 1263 (5th Cir. 1991)), cert. dismissed, 112 S. Ct. 1520 (1992). Nonetheless, the only cases affected by that disagreement are those antedating the November 1, 1991, amendment to Section 4B1.2. The disagreement among the courts as to the proper dispostion of that closed set of cases does not require resolution by this Court.[5]

On May 1, 1992, the Sentencing Commission submitted the revised commentary to Section 4B1.2 to Congress for its review. See 57 Fed. Reg. 20148, 20157 (May 11, 1992). That action would seem to eliminate the court of appeals' principal reason for

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[5] In light of the change in the law of the Fifth Circuit on this issue, this Court summarily disposed of Kyle v. United States, 112 S. Ct. 2959 (1992), which presented the question whether the felon-in-possession offense was a crime of violence for career offender purposes under the November 1, 1989, version of the Sentencing Guidelines. The Court vacated the court of appeals' judgment and remanded the case to the Fifth Circuit for further consideration in light of the 1991 amendment to Section 4B1.2's commentary and the Fifth Circuit's intervening decision in United States v. Shano, supra, which held that the amendment was a clarifying one applicable to cases on direct appeal even if a defendant was sentenced before the effective date of the amendment. This Court's disposition of Kyle does not require the same disposition of this case, because the court of appeals has already considered the applicability of the 1991 amendment to petitioner's status as a career offender.

"declin[ing] to be bound" by the amendment, i.e., that "there is no evidence that Congress review[ed] it or [was] even notified of the alteration." Pet. App. 815. Congressional review of the amendment also moots petitioner's claim, Pet. 18-19, that the court of appeals' refusal to follow the amended commentary in the absence of such review is inconsistent with Williams v. United States, 112 S. Ct. 1112, 1119 (1992), which teaches that "a policy statement that prohibits a district court from taking a specified action [is] an authoritative guide to the meaning of the applicable guideline," and in turn with Sentencing Guidelines § 1B1.7, which states that "commentary is to be treated as the legal equivalent of a policy statement."[6]

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[6] Moreover, the court of appeals' position on this issue may yet be subject to further change. After the denial of petitioner's petition for rehearing, a different panel of the court of appeals expressed doubt about the correctness of the court's decision in this case. In United States v. Bruce, 965 F.2d 1000 (11th Cir. 1992) (per curiam), the panel relied on the decision below in affirming the enhancement of a sentence on the ground that possession of a firearm by a convicted felon is a crime of violence. The opinion stated, however, that two members of the panel voted to affirm only because they believed themselves bound by the decision below; they "would not have adopted" its per se rule as an initial matter "[b]ecause possession of a firearm in many instances could in no way be a violent act as a matter of actual fact * * *." Id. at 1000. Thus, the full court of appeals may yet decide that this rule should not be the law of the circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

IN THE SUPREME COURT OF THE UNITED STATES

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by mail on August 20, 1992.

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August 20, 1992